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November 22, 2004

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VIA HAND DELIVERY

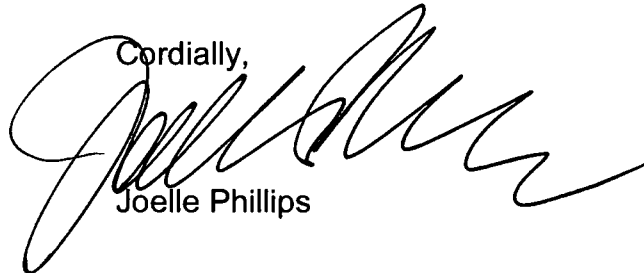
Hon. Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition for Exemption of Certain Services*
Docket No. 03-00391

Dear Chairman Miller:

Enclosed are the original and fourteen copies of BellSouth's *Post-Hearing Brief*.
Copies of the enclosed are being provided to counsel of record.

Cordially,



Joelle Phillips

JJP:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition for Exemption of Certain Services*

Docket No. 03-00391

BELLSOUTH TELECOMMUNICATION INC.'S POST-HEARING BRIEF

This docket has proceeded through two phases: the first on intraLATA toll and the second addresses Primary Rate ISDN ("PRI") service in Tennessee. In the intraLATA toll phase, parties conceded the relevant factual issues, and consequently, no hearing was needed. While the parties have not conceded all factual issues relating to competition for PRI, in this phase, too, the parties agreed that a hearing (with the opportunity for live cross-examination) was not needed. Instead, the parties proposed that they include all discovery and testimony in the record and make legal arguments on the basis of that record. Accordingly, BellSouth Telecommunications, Inc. ("BellSouth") files this *Post-Hearing Brief* and respectfully shows the Tennessee Regulatory Authority ("TRA" or "Authority") as follows:

INTRODUCTION

As in the earlier phase of this docket, addressing intraLATA toll service, the parties have engaged in multiple rounds of discovery and filed testimony relating to the state of competition relating to PRI service in Tennessee. This testimony and discovery paint a compelling picture of a mature and competitive market for this service. First, PRI service is not a new service, and it has been offered in Tennessee to business customers for several years. (AT&T's Discovery Response, Interrogatory 8, noting

AT&T's sale of PRI in Tennessee since 2001. See Blake Direct Testimony at 5, noting promotions by at least four CLECs since 2003 and BellSouth's history of Contract Service Agreements ("CSAs") for PRI since 1998.) Second, today's customers may obtain PRI service from numerous different providers. (Blake Direct Testimony at 4, noting that PRI is offered in Tennessee by at least twelve (12) CLECs.) Third, and perhaps most importantly, PRI service, which provides business customers with multiple voice lines and data service, is a product that is subject to intermodal competition from wireless, broadband, and Voice over Internet Protocol ("VoIP") providers. (Blake Direct Testimony at 6.) That is, customers seeking to obtain such services for their business may choose options **other than** regulated telecommunications options.

Given the many providers of PRI service and PRI substitute services, it is impossible to quantify the "market" for such services. (See, for example, AT&T response to BellSouth's Interrogatory 8, at p. 6, noting that sales of a single competing carrier are not relevant to extent of competition in market.) Because the market is made up of both intermodal competitors and CLEC competitors, it is impossible for any one company offering the service to know or determine the true "size" of the market. Likewise, the Consumer Advocate has conceded that it is not possible to define the true size of the PRI market. (Buckner Direct Testimony at 6.) No party has offered any evidence that is conclusive regarding the actual size of the total market. For this reason, it is not possible for the TRA simply to define the size of the market and consider whether the incumbent provider occupies too great a "portion" of that market or too large a "slice of the pie". Likewise, it is not possible for the TRA, nor for any of the parties participating in this docket, to provide sufficient information to determine the size

of the pie. This was equally true for the intraLATA toll service market, for which exemption has already been granted. Importantly, that type of "market dominance" analysis is neither required nor referenced in T.C.A. § 65-5-108(b).¹

The TRA need not determine the size and share of the market in order to grant relief under § 65-5-108. Instead, the TRA must evaluate "competition" for the service. The testimony shows that whatever the size of the market, the activity in the market and the actions of competitors (such as promotions and CSAs) reflect robust competition for this business service. For this reason, the requirements of the statute have been satisfied, and the TRA should provide exemption relief, similar to that granted for intraLATA toll service, for this service as well. Granting this exemption will further the goals of the Tennessee General Assembly and allow these business customers to obtain services in an even more competitive and dynamic market in Tennessee.

DISCUSSION

I. What Does The PRI Market In Tennessee Look Like?

A. PRI is a business service, long offered by various providers.

Primary Rate ISDN, or PRI service, is an intraLATA offering supported by ISDN architecture. It is a service used by business customers for voice and data switched services, and it enables those customers to use the service for various applications, including:

1. Providing a direct connection between a customer's PBX to their telephone company central office, providing faster call handling.
2. Providing a local presence outside the local calling area of a business – this application is used considerably by Internet Service Providers.

¹ Prior to a numbering change by the Tennessee General Assembly, T.C.A. § 65-5-108(b) has been referred to throughout this proceeding under its former numbering format as § 65-5-208(b).

3. Providing remote high speed access to the corporate network with analog modems or Basic Rate ISDN.²
4. Integrating high speed Internet access with data, video and voice communications.
5. Transmitting large amounts of data at irregular intervals, requiring flexible bandwidth capabilities.
6. Providing dial backup links as redundant facilities for private line service.

(Blake Direct Testimony at 3-4.)

As noted above, the Tennessee market for PRI service includes numerous players. The testimony of BellSouth's witness, Kathy Blake, notes at least twelve CLECs who offer PRI service in Tennessee. (Blake Direct Testimony at 4-5 and Ex. KKB-1.) This list represents only the CLECs, of course, of which BellSouth is aware. There may be more. While AT&T argues that BellSouth has merely counted providers and has not quantified the market shares of such providers, this argument is nothing more than recognition that one provider cannot determine the size and relative shares of the market. AT&T relied on that very fact in explaining why it would not answer discovery questions concerning other players in the market. (AT&T Discovery Response at 6, to BellSouth Interrogatory 8.)

In addition, BellSouth's testimony also recognized the intermodal nature of competition for this type of service. (See Blake Direct Testimony at 6.) Again, BellSouth testified that business customers may choose to provide multiple voice lines for their employees by using PRI or by using VoIP or wireless service. While AT&T's

² ISDN – Business Service (IBS) and ISDN – Residence Service (IRS) provide a method of access to the telephone network called Basic Rate Access, which consists of the ability to access up to two 64 Kbps (B) channels and one 16 Kbps (D) channel at the service delivery point.

witness opines that certain intermodal competitors' products are not good PRI substitutes, AT&T's testimony does not rebut the assertion that VoIP service is, in fact, an example of intermodal competition.

The testimony is also uncontroverted, and a matter of public record, that PRI service has been the subject of numerous BellSouth CSAs and of both BellSouth and CLEC promotions. (Blake Direct Testimony at 5 and Ex. KKB-3.) This, too, indicates the significant competition for these services. Today, business customers consuming such services are savvy and looking for the best deal as demonstrated by their use of negotiated rates. The web advertising for these services also indicates the extent to which competitors are working to win these discriminating business customers. The testimony is also consistent that BellSouth has not engaged in below-cost pricing. Instead, BellSouth has attempted to compete with its many rivals by playing by the rules.

In one important aspect, PRI presents an even more compelling call for exemption than intraLATA toll. While intraLATA toll service is a product consumed by both residential and business customers, PRI service is a business offering. There can be no serious argument – the business market is the most competitive sector of the telecommunications market in Tennessee. The focus by CLECs on business customers has been clear for years from both the 271 cases and from the TRO cases. PRI exemption – unlike intraLATA toll exemption – will be felt exclusively by this most competitive part of the market, in which customers are most savvy. (Blake Direct Testimony at 5, noting that business customers are particularly likely to be aware of competitive pricing and to negotiate discounts.)

B. There is no record to support “market dominance” by the Petitioners and “market dominance” is not the proper test of the TRA to apply.

The most significant area of disagreement between Petitioners and the Consumer Advocate Division of the Attorney General’s Office (“Consumer Advocate” or “CAD”) in this case is the Consumer Advocate’s assertion that BellSouth’s “dominance of the market” prevents the TRA from granting the relief BellSouth seeks. Most of the Consumer Advocate’s testimony focuses on hypothetical arguments regarding what a dominant provider of the service might be able to do if that service were exempted from regulation. The facts, however, simply do not support the assertion that BellSouth “dominates” this market.

The Consumer Advocate proposes no analysis or factual evidence by which it can define the size of the complete market. As noted above, the CAD’s own witness squarely concedes that it is not possible to determine any one provider’s share of the PRI market (Buckner Direct Testimony at 6.) In other words, the Consumer Advocate cannot define the size of the entire pie. Instead, the Consumer Advocate focuses on the number of customers served by BellSouth, suggesting that BellSouth’s slice of the pie is so large that it must be larger than all the other players. Without knowing the size of the pie, a discussion of BellSouth’s slice is simply not relevant to the level of competition in Tennessee. The erroneous conclusion that the Petitioners dominate the market ignores the evidence of vigorous advertising, promotions, bundles and discounts being offered by all players in the PRI market. That type of activity is indicative that *all* companies are feeling the effects of their competitors.

In the intraLATA toll phase of this docket, the TRA properly granted exemption without defining the complete size of the market or the Petitioners’ share in the market.

The statute itself does not reference market dominance or make any requirement that a party seeking exemption demonstrate that it does not occupy a dominant portion of the market. The CAD admits on the one hand that defining market share is impossible, yet both the CAD and AT&T appear to suggest that this impossible task is **required** in order for a petitioner to obtain exemption.

This interpretation of T.C.A. § 65-5-108, that it requires a petitioner to complete an impossible feat before exemption relief can be granted, just does not square with the General Assembly's entire statutory scheme for regulation of telecommunications. The Tennessee General Assembly has been a national model for the promotion and encouragement of competition in telecommunications. Tennessee's regulatory statutes for telecommunications preceded the Federal Telecommunications Act. The language of the exemption statute reflects a strong preference for exemption of competitive services, noting that the TRA "shall" exempt services under proper circumstances. This firm directive cannot be reconciled with a reading of the statute that would require, as a threshold matter, the "impossible" determination of market size. These arguments undermine and incorrectly limit the application of this important statute.

Finally, in the 271 case, BellSouth has shown that its local market is irretrievably open to competition. Neither the FCC nor the TRA imposed a market dominance test in that context, and it would be wrong to read one into § 65-5-108. For all of these reasons, the Consumer Advocate's and AT&T's theoretical discussion of market dominance is simply not relevant to the statute governing this question.

C. BellSouth's provision of wholesale UNEs to CLECs is not relevant to the retail exemption sought.

The Consumer Advocate also urges that the fact that BellSouth provides wholesale UNEs to some of its CLEC competitors prevents "effective price competition" from occurring. (Buckner Direct Testimony at 6-7.) As a threshold matter, if Mr. Buckner's observation were true, then BellSouth – who has a federal obligation to provide certain UNEs – could never obtain relief under § 65-5-108 unless it were relieved of that federal obligation. Again, reading this type of restriction into the Tennessee statute improperly and unreasonably limits its effect.

BellSouth's provision of UNEs does not undermine effective competition in price. Wholesale UNE prices are not the subject of this docket, are not established by tariffs, and when BellSouth is required to provide UNEs, the price of those UNEs is set forth in interconnection agreements subject to TRA approval and arbitration remedies. In short, nothing in this docket will change the way CLECs who choose to obtain wholesale elements from BellSouth currently obtain such elements. The UNE argument is a classic "red herring". It is simply irrelevant.

II. How Could Exemption Affect VoIP in Tennessee?

AT&T's testimony focuses largely on the potential that exemption of PRI service could impact negatively the growing VoIP market in Tennessee. The central concept in this argument is AT&T's assertion that the purchase of retail PRI service is necessary for VoIP providers in order to access the Public Switched Telephone Network ("PSTN"). Stated simply, AT&T argues in its direct testimony that VoIP providers must buy PRI to get to the PSTN. However, this testimony is flatly contradicted by BellSouth's testimony, which notes wholesale products that are available to carriers who offer VoIP

service and connect those carriers to the PSTN. AT&T offered no rebuttal testimony expanding on its position or contradicting Ms. Blake's testimony.

Specifically, AT&T argues that the retail price of PRI should not be exempted from tariffing requirements because it is a "critical input for the implementation of VoIP [Voice over Internet Protocol] service." (Argenbright, p. 11) Mr. Argenbright (at p. 3) claims that exemption of PRI from regulation would allow BellSouth, as an "unregulated dominant provider," to hamper the development of this new technology. This argument wrongly describes the options available to VoIP providers.

Voice calls made via a VoIP application are converted to data packets that are carried over an Internet Protocol ("IP") based network. In order for a VoIP call to be terminated to a customer served by the PSTN, the call needs to leave the IP-based network via a gateway that is connected to the PSTN. Stated simply, the calls need to get from the VoIP provider's IP network to the PSTN in order to reach all other customers. Mr. Argenbright asserts that in order for the VoIP call to be accurately converted from data packets (carried over an IP-based network) back to a time division multiplexed ("TDM") or analog signal, the gateway provider must use the call signaling and control features of the PRI circuits. "Without the use of a PRI circuit, VoIP calls could not interface with the public switched telephone network ("PSTN") with any degree of accuracy or quality." (Argenbright, p. 6) (See also, Brown, pages 3-7.)

AT&T is not correct, as established by BellSouth's rebuttal testimony. In fact, it is not necessary to use PRI to convert signals from voice to data packets,

or from data packets back to TDM or analog. AT&T's claim is apparently premised on its own use of PRI circuits to connect to the PSTN. In actuality, more accurate call information is passed using SS7-based trunks where signaling is at a peer level between networks. PRI was originally built for PBX interface (not a peer relation at all), but it has been widely used by other carriers to connect to the PSTN because it is less expensive and readily available (a sign of the already significant price competition for PRI service). PRI is an alternative, but has limited capacity compared to SS7 signaling. SS7 signaling to a signaling gateway is preferred. (Blake Rebuttal Testimony at 3.)

While purchase of retail PRI from BellSouth may be part of a VoIP provider's business plan, VoIP providers have other options. The preference (if there is one) for use of PRI is simply one more indication that PRI is subject to robust competition and is, consequently, priced attractively for all business customers.

Moreover, BellSouth is not the only provider from whom VoIP providers can buy PRI. They can purchase PRI from any one of at least twelve CLECs offering PRI in Tennessee. Finally, even for those VoIP providers who choose to purchase PRI service from BellSouth in order to supply VoIP, exemption of PRI service and more robust competition will encourage lower prices for this service. This will help, not hurt, those providers.

In short, AT&T's theory that BellSouth's goal in seeking exemption of PRI service is a plan to undermine VoIP is unreasonable. BellSouth's petition in this matter was filed in June of 2003, and BellSouth originally discussed its intent to seek exemption as part of the earlier CSA docket. Consequently, BellSouth has been talking about

exemption of these services for several years. It is far fetched to suggest that this effort was aimed at undermining VoIP services in Tennessee. Certainly the record contains no evidence showing any BellSouth attempt to do so.

The TRA has taken great care to learn about these new VoIP services. The recent TRA workshop is merely one example of the significant care the TRA has taken to be aware of the always-changing, and more intermodal, nature of Tennessee's telecommunications market. Parties should not be permitted to distort arguments regarding new, intermodal competitors in order to impede the use of § 65-5-108 to continue on the steady path, set by the General Assembly, to move more traditional telecommunications services from old-style regulation into market-based regulation. Business customers will benefit from reduced tariffing requirements and the resulting increase in price competitions from all carriers. It is illogical – and ironic – to use **new** technology as an argument for continuation of **old** regulatory requirements.

IV. Petitioners Seek the Same Relief Granted for IntraLATA Toll.

Petitioners seek the same relief for PRI that the TRA granted for intraLATA toll service. As in the earlier phase of this docket, BellSouth has presented evidence of its own discounts and promotions and of the same competitive activity by CLECs and intermodal competitors. The same relief is warranted here.

Perhaps there will always be those who urge the TRA not to forge new ground, never to deviate from the old style of regulation. The naysayers attempt to convince the TRA of negative consequences of moving to new regulation, more controlled by customers and less dictated by government. These arguments underestimate the continuing safety net of the TRA. Nothing in the relief sought tells the TRA to stop

hearing complaints. Nothing in the relief sought changes wholesale processes, largely subject to federal law.

The intraLATA toll phase of the docket demonstrated that this type of exemption is workable, that heeding the General Assembly's call for exemption can and should be done.

CONCLUSION

For all of these reasons, BellSouth urges the TRA to grant exemption for this business service which has been available in Tennessee for many years. Exemption will further the General Assembly's goal and provide better opportunities for business obtaining these services, to find a service that is right for them at a compelling price. Given the large number of competitors offering PRI service or services offering similar functionality, there can be no serious question that competition for this service is at the level the General Assembly referenced in its statute, that is existing and potential competition for PRI service is sufficient to regulate the price of that service

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2004, a copy of the foregoing document was served on the parties of record, via the method indicated:

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